FILED
United States Court of Appeals
Tenth Circuit

March 9, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: DOUGLAS WEST, Movant.	No. 12-7011 (D.C. No. 6:97-CV-00243-JHP-KEW) (E.D. Okla.)

ORDER

Before **KELLY**, **LUCERO**, and **MURPHY**, Circuit Judges.

Douglas West, an Oklahoma prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 habeas application challenging his conviction for first-degree murder in case no. CF-90-15, District Court of Murray County, Oklahoma. We deny authorization.

Section 2244(b) places strict limitations on second or successive § 2254 applications. Such an application cannot proceed in the district court without first being authorized by this court. *See* 28 U.S.C. § 2244(b)(3). This court may authorize a claim only if the prisoner makes a prima facie showing that the claim relies on (A) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (B) new facts that "could not have been discovered previously through the

exercise of due diligence" and that "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.* § 2244(b)(2), (b)(3)(C).

Mr. West invokes both prongs of § 2244(b)(2). With regard to his first claim, he argues that *Skinner v. Switzer*, 131 S. Ct. 1289 (2011), establishes a new rule of constitutional law made retroactive by the Supreme Court, as required by § 2244(b)(2)(A). In *Skinner*, the Supreme Court held that "a postconviction claim for DNA testing is properly pursued in a [42 U.S.C.] § 1983 action." 131 S. Ct. at 1293. Mr. West seeks the opportunity for DNA testing of a certain firearm. With regard to this claim, however, the motion for authorization is unnecessary because *Skinner* approved of a civil rights cause of action, not a habeas claim. Mr. West does not need this court's authorization to pursue a claim that is properly brought under § 1983.

The remaining claims that Mr. West seeks to assert are four claims of ineffective assistance of appellate counsel and a claim of deprivation of due process through prosecutorial misconduct. All rely on the "new facts" test of § 2244(b)(2)(B). The facts underlying the claims concern allegedly perjured trial testimony, as established by the transcripts of the preliminary hearing and the trial. But the transcripts were available, in the exercise of due diligence, well before Mr. West filed his first federal habeas application in 1997. He asserts that

they were unavailable to him because everyone believed that his appellate counsel had lost them in 1993, until his sister discovered them in her attic in December 2010. There is no explanation, however, why Mr. West was unable to obtain substitute copies of the transcripts, perhaps from the court or the court reporter, at any time prior to his first habeas proceeding. Further, documents presented with the transcripts indicate that Mr. West actually was aware of the allegedly perjured testimony at the time of his direct appeal, again well before his first habeas proceeding.

The motion for authorization is DENIED as unnecessary as to the first proposed claim and DENIED as to all other proposed claims. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk